

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	
)	CR NO. S-04-65 GEB
Plaintiff,)	
)	
v.)	<u>TENTATIVE RULING</u>
)	
BILLY D. SOUTHERLAND,)	
)	
Defendant.)	
_____)	

Defendant Southerland moves for "an order staying the imprisonment portion of his sentence pending the Ninth Circuit's decision on his appeal from the district court's orders, judgment and sentence in this case." (Motion at 1.) Southerland argues his appeal raises substantial questions of law and fact. The government opposes the motion, stating in its opposition that "the court's rulings were correct" and do not involve "issues that are fairly debatable, that would likely result in a reversal, order for new trial, or a reduced sentence." (Gov't Opp'n to Def.'s Mot. for Release Pending Appeal ("Opp'n") at 11.)

The parties also dispute whether Southerland is likely to flee or be a danger to the community if released.

Discussion

A. Blakey/Booker Issue

Southerland contends his "Fifth Amendment due process and grand jury right to be indicted on the amount of loss" was violated when he was sentenced "on a loss figure that was not charged in the indictment. . . ." (Motion at 5.) The essence of Southerland's argument appears to be that his sentence on the judicially-found loss figure of \$604,585 was illegal since that loss amount was not authorized by the jury verdict. Southerland "received a 14 point increase in his offense level due to the court's calculation of loss." (Motion at 6.) Southerland makes several fairly debatable arguments against the amount of loss finding.¹ But see United States v. Dupas, 417 F.3d 1064, 1069 (9th Cir. 2005) (indicating that a defendant has fair notice "when he committed his crime" and was found guilty "that his sentence could be based on a judicial determination of the amount of intended loss and set within the applicable statutory maximum").

However, the remaining issues Southerland argues do not present substantial questions. Notwithstanding the existence of substantial questions, before Southerland can be released pending appeal, it must be found "by clear and convincing evidence that [Southerland] is not likely to flee or pose a danger to any other person or the community." 18 U.S.C. § 3143(a)(2)(B).

¹ The Rule 32 Sentencing Order on the loss states Southerland's offense is the same whether an actual loss or intended loss figure is used. See Order filed August 15, 2005, at 7 and 8, n.5. But Southerland vigorously disputes both loss amount figures.

Danger to the Community

The issue of dangerousness in this case concerns whether Southerland poses an economic danger to the community if he is released. Southerland's apparent obliviousness at his sentencing to the criminal activities underlying the jury guilty verdict, coupled with his complete lack of remorse and proclamations of innocence indicate that he is not averse to engaging in the type of criminal behavior again. But in light of his age and apparent lack of assets to start a business, I do not find him to pose an economic danger to the community if he is released.

Flight Risk

The government argues that this Court previously denied Southerland's release and that nothing has changed since that ruling other than "the fact that the defendant is now a sentenced prisoner." (Opp'n at 4.) However, this Court's previous ruling on Southerland's request for release pending his sentencing hearing found Southerland "is a flight risk" and authorized his release under a "Magistrate Judge['s] previously found . . . combination of conditions [of release] . . . except for the first portion of Condition No. 7, which [required Southerland to] 'seek and/or maintain employment.'" (Order filed April 26, 2005, at 8.)

The factors in 18 U.S.C. § 3142(g) that are to be considered when assessing the risk of flight include: (1) the nature and circumstances of the charges and counts of conviction, (2) the weight of the evidence, (3) defendant's history and personal characteristics, and (4) defendant's family ties.

1 a. Nature and Circumstances of Charges and Counts of
2 Conviction

3 Southerland was convicted of mail fraud. Southerland's
4 scheme to defraud involved thousands of victims who suffered a loss by
5 paying money to Southerland's vehicle moving business to get their
6 vehicles moved but did not get their vehicles moved. Southerland
7 obtained from victims a minimum of \$200 through a fraudulent
8 representation about his vehicle moving business's movement success
9 rate, which constituted an intended loss of \$439,400 (\$200 multiplied
10 by the number of victims between December 18, 2002, through
11 November 30, 2003). (Rule 35 Sentencing Order filed Aug. 15, 2005, at
12 7-8, n.5.) After Southerland obtained certain victims' money, his
13 behavior toward them was obnoxious, obscene and insulting. This
14 factor weighs against bail.

15 b. The Weight of the Evidence

16 Substantial questions are involved with determination of the
17 amount of loss, which if resolved in Southerland's favor, would result
18 in a sentence less than the sixty-seven month prison sentence
19 Southerland received. This factor favors release.

20 c. History and Personal Characteristics

21 These factors are discussed in the April 26, 2005, Order as
22 follows:

23 The jury verdict, which convicted Southerland
24 of three felony counts of fraud, and the trial
25 record shed light on Southerland's history and
26 personal character. The trial testimony revealed
27 that Southerland was verbally abusive when
28 communicating with some of his customers during
telephone conversations, and that this abuse at
times included name calling, use of expletives,
and rudely hanging up on some of his customers.

1 Southerland's Pretrial Services Report dated
2 February 2, 2004 ("PSR"), recommended that
3 Southerland be detained as a flight risk. This
4 PSR reveals Southerland's criminal history, which
5 includes a 1971 voluntary manslaughter conviction;
6 and a conviction for disturbing the peace for
7 which he was sentenced to one year probation in
8 April 2002.

9 The transcript of Southerland's detention
10 hearing held February 4, 2004, reveals that the
11 Magistrate Judge essentially found that
12 Southerland was in the process of trying to flee
13 when law enforcement agents encountered him on his
14 premises, which they were then about to search
15 pursuant to a search warrant. The transcript
16 reveals when Southerland was then encountered,
17 "the house was packed, the car was packed, and
18 there was a passport and \$12,000 cash in [a safe
19 located in a] truck." (TR at 4, 23.) The
20 Magistrate Judge also observed that "according to
21 the government, there's a minimum of a million
22 dollars missing here. . . ." and that Southerland's
23 action "seems like flight" (Id. at 12.)
24 Although it was argued at that detention hearing
25 that Southerland was on his way to Texas, the
26 Magistrate Judge observed, "you don't need a
27 passport to go to Texas." (Id. at 23.) A law
28 enforcement agent told the prosecution at the
29 hearing that at the end of the day on which
30 Southerland's premises was searched, Southerland
31 stated he intended to go to Scotland. (Id. at
32 24.) The agent related that Southerland said
33 "there's a passport and cash in a safe in the back
34 of the Suburban, I want it." (Id. at 25.) "I'm
35 going to Scotland." (Id.)

36 Southerland's attorney argued Southerland did
37 not tell the agent he was going to Scotland, but
38 Southerland's counsel stated at the end of the
39 hearing that Southerland has been to Scotland
40 before, "he's Scottish" and Southerland had "a
41 reservation to go to Scotland in June." (Id. at
42 31, 33.) Also, the "agents were told by one of
43 the gentlemen that ran [Southerland's] computer
44 system, that Mr. Southerland had said to this
45 person . . . that [he] could run this system from
46 Belize or Scotland." (Id. at 30.) This computer
47 system, or internet business, was involved with
48 the crimes of which Southerland was convicted.
49 (Id.)

50 The Magistrate Judge questioned Southerland's
51 veracity by indicating that the record revealed
52 Southerland said "he was going to Scotland three

1 times, and [had] the computer system . . . set up
2 [so] it could be run from Scotland." (Id. at 32-
3 33.) The Magistrate Judge concluded that
4 Southerland is "a flight risk" and "[t]here are no
reasonable conditions to ensure against
flight. . . ." (Id. at 34.)

5 But Southerland again sought release pending
6 trial. At a subsequently held detention hearing
7 on March 31, 2004, the record contains information
8 bearing on Southerland's veracity. At this
9 detention hearing, Southerland submitted
10 misleading information regarding the equity in his
11 residence in Anderson. Specifically, he submitted
12 a letter from a real estate agent, Ken Murray, as
13 evidence of \$150,000 fair market value of the
14 property. When this letter was submitted to the
Court, his property was listed on the Multiple
Listings Service through another real estate
agent. The Magistrate Judge ordered Southerland
released on bond which would be secured by his
Anderson property. But Southerland failed to tell
the Court that he had filed a homestead exemption
between the time of ordering a title report and
offering the documents to the Court. On May 12,
2004, the Magistrate Judge set Southerland's bond
at a minimum of \$48,000.

15 The effect of filing the homestead exemption
16 was that there was no available equity, because
17 pursuant to California Civil Procedure Code
18 sections 704.720 and 704.730, upon the sale --
19 voluntary or by execution -- up to \$75,000 of the
proceeds from the sale of the property must be
paid to the homesteader. Thus, the equity
Southerland offered for his appearance bond
appeared to be illusory.

20 In addition, at the May 12 detention hearing,
21 the Magistrate Judge was troubled about why
22 Southerland allowed his wife and daughter to
23 testify falsely in regards to his violent nature.
As pointed out by the Magistrate Judge in her
Order filed May 24, 2004:

24 [B]ased on the filing of letters of
25 clarification by Mrs. Southerland and Mrs.
26 Hurst following the hearing on May 12th, the
27 court infers that neither person was willing
28 or able to testify regarding the substance of
the clarifying information related to
defendant's abusive behavior in defendant's
presence [at the detention hearing]. This
unwillingness or inability further suggests
defendant exerts some level of intimidation

1 or control over his wife and daughter,
2 however subtle or subconscious.

3 ***

4 While the court is cognizant of defendant's
5 5th Amendment rights, it is troubled by the
6 lack of any apparent initiative on
7 defendant's part to assist his counsel in
8 clarifying the record made at the May 12th
9 hearing, particularly with regard to the 1989
10 restraining order obtained by Mrs.
11 Southerland. If in fact the abuse alleged in
12 the restraining order application is past
13 history, defendant could not have been
14 penalized by helping to ensure the court was
15 aware of its existence. Under the
16 circumstances, the court infers defendant was
17 more than willing to countenance the creation
18 of a misleading impression if it would
19 facilitate his release.

20 (May 24 Order at 11-12 and n.10 (citation omitted)).
21 (April 26 Order at 4-7.)

22 Further, in light of Southerland's proclamation of his
23 innocence at his sentencing hearing, it is assumed that he has a
24 motive to flee so he could avoid facing approximately thirty-five
25 months of additional prison time for business practices found by the
26 jury to be fraudulent but which he opines were legal. These factors
27 do not favor release.

28 d. Family Ties

As stated in the April 26 Order,

the record is devoid of evidence of family ties
evincing that Southerland has relationships with
family members "wherein the family members had
some control, either physical or emotional, over
[Southerland's] action." United States v.
Trosper, 809 F.2d 1107, 1110 (5th Cir. 1987).
Although Southerland indicated through his
attorney at the April 8 hearing that he desires to
see his grandchild who was born while he has been
incarcerated, this desire does not show the
existence of a family relationship likely to
dissuade Southerland from fleeing. Since

1 Southerland was in the process of leaving
2 California at the time of the search of his
3 premises, at that time he presumably did not have
4 a sufficient family tie to this community to
5 dissuade him from leaving the area. Therefore, at
6 the present time, Southerland's family ties offer
7 no assurance of his appearance at future
8 proceedings.

9 (April 26 Order at 7-8.)

10 This factor does not favor release.

11 Consideration of all the factors reveal that there is no
12 condition or combination of conditions which would reasonably assure
13 Southerland's appearance at future court proceedings. Therefore, his
14 motion is denied and he is detained as a flight risk.

15 Dated: September 8, 2005

16 /s/ Garland E. Burrell, Jr.
17 GARLAND E. BURRELL, JR.
18 United States District Judge
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